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Case Number 84-473

In The

Supreme Court of the United States

October Term, 1984

DANNIE R. CERTAIN,

Petitioner,

v.

CITY OF HUNTSVILLE, ALABAMA, A MUNICIPAL CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS FOR REVIEW

I. Whether Dannie Certain proved jurisdiction for his petition for a writ of certiorari?

II. Whether the Supreme Court of Alabama erred in ruling that the Huntsville Police Department Regulations dealing with political activity were constitutional?

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STATEMENT OF THE CASE

Dannie Certain was employed by the City of Huntsville as an officer on March 1, 1980. (RT 268) He was told by his Sergeant to report on February 1, 1982, to City Hall at 7:30 A.M. to the City Council Chambers. He was off duty that day. (RT 271) He was told he would be paid for call-out time. (RT 271) Mr. Certain expected to be paid four hours call-out time, or $25.04 for attending what turned out to be an award ceremony where he himself received an award, although he does not know if other employees were paid for coming in in situations such as that. (RT 272) He left the meeting about one hour and 20 to 25 minutes after the 7:30 start. (RT 272) He admits to having two or three beers later that morning and to having a couple of beers prior to going back home in the afternoon. (RT 273) He drank another beer at his brother's house with supper and started to drink another when he got worried that his friend, Mr. Baird, was trying to get in touch with him. (RT 274) He was asked by Mr. Baird to assist him in confronting an employee at his convenience store who he suspected of taking money. (RT 274) He got to Mr. Baird's about 8:00 o'clock and they sat and talked for a couple of hours. (RT 275) Mr. Baird confronted his employee in the presence of Certain. The employee knew Certain was an officer. (RT 346) (RT 275) The employee confessed. (RT 276) Officer Certain called the Police Department of the City. (RT 276-77) Mr. Melton, the employee, was, according to Officer Certain, not then in custody. (RT 278) An on-duty officer arrived and money that had been marked was found as part of money the employee said he took today. (RT 280) The confrontation oc-

curred around 12:00 midnight. (RT 281) Officer Certain read the suspect his rights after having been told by a superior to do so and the suspect confessed again. One of the officers on the scene observed that Mr. Certain had a smell of alcohol on his breath. The next day when Officer Certain reported for work, he was called in and questioned about the incident by Captain Rickles. (RT 282-87) The interview was recorded (see Defendant's Exhibit 10, CT 180, and Defendant's Exhibit 2, CT 172, for transcription of interview). Captain Rickles asked Certain what he thought "blood alcohol's going to show, with six or seven beers." (Page 4, Exhibit 10). Mr. Certain answered, "It would probably show bout thirteen . . . fourteen." Mr. Certain was not armed as required by department regulations. (Exhibit 10, Page 4) Mr. Certain considered resigning and offered his written resignation. (RT 288) He was told to take the next day (Wednesday) off and cool off. (RT 288) He was told to report for duty at 1:30 P.M. on Thursday. (RT 289) Officer Certain who had become angry with Captain Rickles (RT 428), and intemperate (RT 429), and upset about his resignation not being accepted, called a reporter for the Huntsville Times (RT 420) on the morning of February 4 and made numerous comments which were published (Defendant's Exhibit 4, CT 174), including a statement that Captain Rickles had "accused him of being intoxicated". Subsequent to the publication of the article, Captain Rickles accepted his resignation effective at the end of the shift at about ten to fifteen minutes after 2:00 P.M. (RT 290--Plaintiff's Exhibit 10, CT 151). At the time the matter of his possible intoxication was not a public issue, as only he, Sergeant Collie, and Captain

Rickles knew of it. (RT 428) That evening Officer Certain appeared at a public work session (RT 437) of the Council and tendered his resignation to the Council, which resulted in another news article which is acknowledged by Certain to be a fair and accurate report (RT 439) (Defendant's Exhibit 3, CT 173) in front of a room filled with news reporters and rolling TV cameras (Defendant's Exhibit 10). The Administrative Assistant to the Mayor told the Council that the resignation had already been accepted and he was asked to reconsider and file a grievance instead (Defendant's Exhibit 10). Chief of Police Vizzini was out of town in Washington, D.C. during the time of the Certain incident and did not return to the city until February 12, 1982, although he was told about it by phone and ordered a complete package of the investigation upon his return. (RT 775) Vizzini reviewed the package concerning the investigation (RT 776), listened to the tape of Certain's conversation with Captain Rickles, reviewed a transcript thereof (RT 777), consulted two members of the legal staff, requested the legal staff to review the reports and interview the witnesses concerning the incident (RT 778), was told that Attorney Roy Miller of the legal staff had interviewed the victim, Mr. Baird, and had reviewed the incident with the District Attorney (RT 779-80), and received the report that the incident was not prosecutable because of the actions of Officer Certain (RT 781), and read Certain's interview of February 4. (Defendant's Exhibit 4) (RT 781) Vizzini was contacted by Reta McKannan, the same reporter Certain called which generated the February 4 news article. (RT 787) He had an off the record background interview with Reta McKannan to hold it until a written release was furnished. (RT 789) Two releases were made, one re-

sulting in a news report of February 18, and one resulting in a news report of February 21, both releases were submitted to the City Attorney for approval. (RT 790) (Exhibit 5, CT 175, and Plaintiff's Exhibit 20, CT 159) Reta McKannon did not substantially deviate from the printed release in preparing her article of February 18 and she didn't use any of the oral comments in the article. (RT 798-99) The article that appeared as a result of the February 21 release, however, did deviate somewhat from the printed handout, did use some substantially accurate oral statements, and except for Certain's out of context statements, and some of her own words that were added, was ostensibly correct. (RT 827)

During the time that Certain was employed by the City there was in effect in the Police Department certain administrative rules and regulations (Plaintiff's Exhibit 6, CR 147) which it was the custom of the department to enforce and this custom was known to the governing body of the City. (RT 809) Certain was provided a copy of the rules and regulations. (RT 326) Certain was also provided a copy of the Employee Handbook of the City which stated therein the grounds for discipline of an employee (RT 36, Plaintiff's Exhibit 7).

The pertinent police regulations which form the only basis for the Petition for Certiorari are as follows:

> "1.3.9.18 *POLITICAL SOLICITATIONS*—Members or civilian employees of the department shall not solicit contributions in money or any other manner, directly or indirectly, on any pretext, to any person, committees or associations for partisan political reasons, nor shall they interfere or use the influence of their office for partisan political reasons."

Certain incorrectly contends that Regulation 1.3.4.24 is in issue in this case. This regulation was not a regulation that went to the jury as a basis of a decision in this case. This regulation states:

> "1.3.4.24 (Employees of the department may be subject to dismissal, demotion, or suspension for) engaging in partisan politics.

The above stated regulation is not an issue in this appeal because it was not an issue in the Trial Court. The issues submitted to the Trial Court are stated *infra*.

Dannie R. Certain brought his complaint against Sal Vizzini and the City of Huntsville on September 23, 1982. (CR 3) Counts one through four made various claims against Sal Vizzini, Chief of Police of the City of Huntsville, for alleged defamatory statements made of and concerning Certain, who had been a police officer of the City of Huntsville, and who had resigned after becoming involved in an incident while off duty.

Count eight of the original Complaint purported to state a claim in the amount of $100,000 against both defendants for defamation with respect to a press release of February 21, 1982, issued by Vizzini which was alleged to have caused injury through the neglect, carelessness, or unskillfulness of an agent, officer, or employee of the municipality.

The case went to the jury on four claims of defamation against Vizzini, claiming Vizzini falsely and maliciously:

> (1) Charged the plaintiff with being responsible for tainting the evidence in a felony criminal case.
>
> (2) Charged the plaintiff with being probably legally intoxicated when the plaintiff witnessed a friend

confront an employee regarding theft at a retail establishment.

(3) Charged the plaintiff with being "drunk, that is inebriated". (RT 1012)

(4) Issued a press release dated February 21, 1982, making certain claims which were alleged to be false and which made certain imputations against the plaintiff which tended to bring the plaintiff into public hatred, contempt or ridicule or charged an act or acts odius and disgraceful in society, and that the defamatory remarks against the plaintiff were directly tended to prejudice him in his office or lawful employment as a law enforcement officer or deputy sheriff. (RT 1012-16)

The case went to the jury on claims against the City of Huntsville as follows:

1. $25.04 plus interest call-out pay because he was required to appear at an award ceremony on his off day. (RT 1028-29)

2. The 42 USC 1093 claim based upon the following:

a) A regulation of the City of Huntsville Police Department which reads: "Members and civilian employees of the department shall not solicit contributions in money or any other manner, directly or indirectly, *on any pretext* to any person, committees or associations for partisan political reasons" (emphasis supplied), to which Dannie Certain alleged he was subjected to while a police officer of the City of Huntsville. (RT 1031)

b) A regulation of the City of Huntsville Police Department which states: "Members and civilian em-

ployees of the department shall pay all legal debts. Any member or civilian employee of the department who undertakes the act of bankruptcy shall be subject to dismissal or disciplinary action following review or verified facts by the Chief of Police", which Dannie Certain alleges he was subjected to while a police officer of the City of Huntsville. (RT 1032)

c) Alleged refusal of the defendant, City of Huntsville, to provide the plaintiff with his paycheck from Friday, February 19, 1982, to Monday, February 21, 1982, in retaliation for his having exercised his first amendment privileges of free speech.

d) The alleged defamations committed by the defendant Vizzini taken as official action by the City in retaliation for the plaintiff having exercised his first amendment privileges. (RT 1036)

e) That the City of Huntsville conducted a scheme or policy or a conduct of harrassment against him in retaliation for having exercised his first amendment rights, including

1) plants of contraband or other items in motor vehicles

2) surveillance of him at his home

3) alleged surveillance or attempt to surveil the FOP Lodge where he alleged he was a member or had some connection (RT 1036)

Certain's state law claims, where he insists that his rights under State law were violated, were dismissed. The State law issues did not go to the jury at the Trial Court level. It is axiomatic that these issues cannot be

raised for the first time on appeal. Certain, however, improperly tries to make an issue based on State law, an issue that did not go to the jury in Trial Court.

The City filed a Motion To Dismiss for Failure to State A Claim Upon Which Relief Could Be Granted which was overruled (CR 17), an Answer (CR 18-30), an Amendment to Answer (CR 95), a Motion For Summary Judgment (CR 89), and also an Affidavit in Support of Motion for Summary Judgment (CR 93).

The jury returned a verdict against the City founded on 42 USC 1983 in the amount of $50,077.00. The jury returned a verdict in favor of defendant Vizzini on the defamation claims. (RT 1048-49)

The City filed a Motion For Judgment N.O.V. or in the alternative for new trial (CR 112) with amendment (CR 128), which was overruled by the Court (CR 132). The Court entered an Order assessing counsel fees (CR 135), however, there has been no appeal from the Order assessing counsel fees, the defendant being satisfied with the assessment and amount of such fees, in the event the Judgment is not reversed.

The City of Huntsville appealed the Circuit Court Judgment to the Supreme Court of Alabama. In a well-reasoned opinion the Alabama Supreme Court reversed the decision of the Circuit Court and held that the Huntsville Police Department regulations were not violative of the U.S. Constitution and Federal laws and that the Circuit Court erred in failing to grant the City's Motion To Dismiss For Failure To State A Claim Upon Which Relief Could Be Granted.

On September 20, 1984, a Petition for Writ of Certiorari was filed with the Supreme Court of the United States by Dannie Certain.

In his brief Mr. Certain has made several statements that are erroneous. Although the City does not suggest that these errors were intentionally made to mislead the Honorable Court, we feel they must be pointed out so this Court can consider the true facts in the case:

In page one Certain states he was constructively discharged. In fact, Certain resigned from his employment with the City of Huntsville. On page eight Certain says that he and other Police Department employees were prohibited from voting. This is *totally false.* The Huntsville Police Department has always been able to vote in any and all elections. On page ten Certain again insists that the Police Regulations prohibited participation in partisan politics and that this contravenes Sec. 17-1-7, Code of Alabama (1975). This is a regulation and another issue that was not submitted to the Trial Court. It is too late to raise this issue on appeal.

———o———

QUESTIONS FOR REVIEW

I. Whether Dannie Certain Proved Jurisdiction For His Petition For A Writ Of Certiorari?

II. Whether The Supreme Court Of Alabama Erred In Ruling That The Huntsville Police Department Regulations Dealing With Political Activity Were Constitutional?

The Writ Of Certiorari Should Be Denied Because Federal Law Clearly Resolves The Issues At Bar And Because The Rulings Of The Alabama Supreme Court Are Constitu-

tional And In Accord With Decisions Of The Honorable Supreme Court Of The United States.

I. Dannie Certain Fails To Prove The Jurisdiction For A Writ Of Certiorari.

Dannie Certain has failed to raise the issues he presents in a timely fashion in the Trial Court. The Petition for a Writ of Certiorari should be denied because Dannie Certain failed to comply with Rule 21(h) of the Rules of the Supreme Court of the United States.

Rule 21(h) states:

> "(h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e. g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari. Where the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(k) of this Rule."

Mr. Certain failed to specify the method and manner of raising federal issues. He failed to quote pertinent parts of the record. He also failed to show the federal question was timely and properly raised.

Mr. Certain has completely failed to comply with Rule 21(h) of the Rules of the U.S. Supreme Court.

II. The Alabama Supreme Court Correctly Ruled That The Huntsville Police Department Regulations Dealing With Political Activity Were Constitutional.

Mr. Certain is, in effect, asking this Honorable Court to declare the Hatch Act unconstitutional. He feels that since all employees are not subject to the Hatch Act there is a denial of equal protection under the law. He feels that the Hatch Act is so overly broad and vague that his Fourteenth Amendment rights are violated. He also thinks that the Hatch Act denies his First Amendment Rights of freedom of expression. It will become evident that this form of reasoning is mistaken.

The Hatch Act has been subjected to a host of attacks, but the U.S. Supreme Court has always found it to be constitutional. The provisions of the Huntsville Police Regulations are very similar to the Hatch Act. In 5USCS Sec. 7324 the Hatch Act provides:

> "(a) An employee in an executive agency or an individual employed by the government of the District of Columbia may not —
>
> . . .
>
> "(2) take an active part in political management or in political campaigns. . . . "

The Huntsville Police Regulations state:

> "1.3.9.18 *POLITICAL SOLICITATIONS*—Members or civilian employees of the department shall not solicit contributions in money or any other manner, directly or indirectly, ON ANY PRETEXT, to any person, committees or associations for partisan political reasons, nor shall they interfere or use the influence of their office for partisan political reasons." (emphasis supplied)

In addition, both the Regulation and the Hatch Act permit non-partisan politics, and employees still have the

right to vote. The Hatch Act has been attacked thousands of times, yet it is always upheld as constitutional. Sec. 26 Am Jur 2d, 199, Elections Sec. 387; 15 Am Jur 2d 767, Civil Rights Sec. 243, 29 C.J.S. 821, Elections Sec. 334(1); Validity of Statutes Restricting Political Activities of Public Officers or Employees, 33 L.Ed 2d 865; Validity of Restriction on Political Activities of Officers, 91 L.E. 787; SHARTSIS, The Federal Hatch Act and Related State Court Trends, 25 Bus Lawyer 1381; VAUGHN, Restrictions on Political Activities of Public Employees, 44 George Washington L. Rev. 516; ROSE, a Critical Look at the Hatch Act; 75 Harv. L. Rev 510; MARTIN, The Constitutionality of the Hatch Act, 6 U. Tol L.Rev 78; ESMAN, The Hatch Act—A Reappraisal, 60 Yale LJ 986; *United Public Workers v Mitchell* (1975) 330 US 75, 91 L.Ed 754, 67 S.Ct. 556; *United States Civil Com. v National Ass. of Letter Carriers* (1973) 413 US 548, 37 L Ed 2d 796, 93 S.Ct. 2880; 5USCS Sec. 7324 and annotations.

The rule of regulation of the Huntsville Police Department with respect to political activity could not furnish the basis for the jury verdict in this cause. First, the rule is not invalid under federal law. See *United Public Workers v. Mitchell, supra.* See also *Wachsman v. City of Dallas,* 704 F. 2d 160, (5th Circuit). The rule by its terms only applied to "partisan" or party political activity. Second, it was very narrowly drawn, involving only solicitation upon any "pretext". If it is invalid at all, it is only because of a state statutory provision (Code of Alabama, 1975, Section 17-1-7) without which it obviously would have stood muster under *Mitchell, supra.* The Code of Alabama is not in issue in this appeal because Certain failed to raise that question. Further, there was abso-

lutely no evidence that it was ever enforced against Dannie Certain. Mr. Certain testified that he wanted to support Ronnie Flippo. The Court should take judicial notice that Mr. Flippo ran for office in November, 1981. Mr. Certain's claim and complaint would not, even in the most liberal interpretation in his favor, put the defendant City or the Court on notice as to what it was called upon to consider. There is no direct reference to any infringement of any of claimant's rights as a result of the rule. Moreover, he was not a member of the class to which it applied at the time of his claim, or at the time of trial. Mr. Certain knew other officers participated in political activity (RT 481), knew that other officers had run for partisan political office (RT 492-93), and knew that other officers had actively supported candidates and that nobody had been charged with violating rules because they supported a candidate or helped in a campaign (RT 494), and knew that he had a right to a hearing if he was going to be disciplined. (RT 485)

In *Davis v. Williams,* 617 F 2d 1100 (5th Cir. 1980), *cert denied,* 449 U.S. 937, 101 S. Ct 336, 66 L Ed 2d 160 (1980), the United States Court of Appeals held that the government has greater latitude in formulating personnel regulations for firemen. According to the Court "It is necessary, . . . to analyze the character of the employment concerned and in the strength of the government interest in regulating the conduct of the employee in the manner chosen, balancing the interests of the employee as citizen against the government's need to control him as an employee." In the present case, the Huntsville Police Department needed to restrict the activities of its policemen with a Hatch-type Regulation to avoid intereference with

the policeman's performance on the job. The Police Department can be treated differently from other employees who work for the City of Huntsville because their situation is different.

In addition, *Kelly v. Johnson,* 96 S.Ct. 1440, (1976) upholds strict dress and grooming regulations for policemen because the complaining policemen could not demonstrate there was no rational connection between the regulation and the needs of the Police Department. In the case at bar, the Huntsville Police Department needed a Hatch-type act to prevent abuses of the political system. The government has a strong interest in restricting the practices of partisan politics by the Huntsville Police Department.

First, there is the interest of efficient government. Then there is the right of each citizen to be free of governmental discrimination based on political activity. Finally, governmental employees should be free of employer pressure in their personal political decisions. Partisan political activity by the police would impair public confidence in government and would create governmental inefficiency. The regulations for the Huntsville Police Department differ from regulations affecting other employees of the City because of the nature of police activity. A police officer is in a different situation than other City employees. First, the paramilitary organization of the police distinguishes them from other City employees. Second, the arrest powers of the police make the police different from other City employees.

At first Federal employees were not covered by the Federal regulations against participation in partisan poli-

tics. Civil Service Rule I, which forbade certain types of partisan politics, covered only the classified service. *United States Civil Service Commission v. National Association of Letter Carriers,* 93 S. Ct. 2880 (1973). The City of Huntsville is thus entitled to utilize regulations for police officers that do not apply to other City employees.

In *Paulos v. Breier,* 507 F. 2d 1383 (U.S. Ct. App. 7th Cir. 1974), the Seventh Circuit Court of Appeals held that a police department rule restricting police officers from interfering or using influence of their office for political reasons was not an unconstitutional regulation of free speech. In addition, the Court held that such a regulation was not unconstitutionally vague.

The City of Huntsville has the power to prevent certain types of political activities by the Police Department. It does ›t matter that all City employees are not subject to these regulations. A Hatch Act type ordinance is permissible in a situation where political activity would inure to the detriment of governmental functioning. The City of Huntsville has the right to adopt a Hatch-type Act to prohibit City police officers from engaging in partisan politics. *Alires v. Turner,* 449 P. 2d 241, (Utah 1969).

In *City of Huntsville v. Dannie R. Certain,* 453 So.2d 715 (Ala. 1984) the Alabama Supreme Court eloquently stated the question of the validity of the Huntsville Police Regulations. A copy of the opinion of the Alabama Supreme Court, in its entirety, is attached as Appendix A. The following pages are a direct quotation from this decision:

"In the Complaint Certain made numerous allegations in support of his Section 1983 claim. Generally, they can be divided into two groups. First, he alleges that the

City wrongfully took action against him in retaliation for his exercise of his First Amendment Rights. Second, he asserts that the City directly infringed upon rights protected by the Constitution, laws of the United States, and State statutes. *We feel the Court should not consider any contention, made in support of the Section 1983 claim, that Certain's rights secured by State law were infringed upon because Section 1983 provides a remedy for infringement of rights guaranteed by the Constitution and laws of the United States only. Baker v. McCollan,* 443 U.S. 137 (1979); *Croy v. Skinner,* 410 F. Supp. 117 (N.D. Ga. 1976). (Emphasis supplied)"

In *Croy v. Skinner, supra,* the United States District Court held that the "violations of State law do not state a claim for relief under 42 U.S.C. Sec. 1983."

In *Shields v. Hopper,* 519 F 2d 1131 (5th Cir. 1975) the United States Court of Appeals states that "(t)he claim that State officials have failed to follow the procedural provisions of State law, without more, does not aver a cause of action."

The United States Court of Appeal again *refuses* to equate violation of a State statute with violation of the Constitution or laws of the U.S. That Court wisely discusses this point in *McDowell v. State of Texas,* 465 F.2d 1342 (5th Cir. 1971) in which the Plaintiff averred violation of 42 U.S.C.A. Sec. 1983 because of a violation of a State statute. The Court reasoned:

> The termination of Dr. McDowell's status as a State employee rests solely on a claim that his employers violated State statutes and local policies in effecting his termination. The right to employment by a state, in itself, is not a right secured by the Consti-

tution or by the laws of the United States; this, even an invalid or an improper discharge from such an office, unaccompanied by some more precise claim of *federal right* than a general claim of lack of due process, is not the sort of deprivation of a right, privilege or immunity which is secured by the Constitution of the United States or an Act of Congress providing for equal rights of citizens within the meaning of 28 U.S.C.A. Sec. 1343(3). Cf. Johnson v. Hood, 430 F.2d 610 (5th Cir. 1970). Cases of this genre constitute uniquely State causes of action. As such they are peculiarly within the realm of State courts. 'A right to have state (or city) laws obeyed is a state, not a federal right.' Love v. Navarro, 262 F. Supp. 520 (D.C.Cal. 1967). 'Mere violation of a State statute does not infringe the federal Constitution.' Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397, 88 L. Ed. 497 (1944); cf. Gentry v. Howard, 288 F. Supp. 495 (E.D.Tenn.1968). Even though it is patent that the amorphous and protean contours of substantive due process under the Fourteenth Amendment extend to all citizens in all sorts of conditions and circumstances, it is equally axiomatic that federal jurisdiction under Sec. 1343(3) and 42 U.S.C.A. Sec. 1983 cannot be extended to that purely local squabble by the mere invocation of the generalized protection which these words of the amendment confer.

The Constitution's deeply embedded concepts of federalism demand that we refuse a procedure of statutory construction that would put such a literal gloss on the words of Secs. 1343 and 1983 as would kill the spirit the founding fathers quickened when the people of the sovereign states ceded sufficient governmental power to form a sovereign union. National Woodwork Manufacturers Ass'n v. N.L.R.B., 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967). If we were to distort Secs. 1343 and 1983 to vest federal courts with jurisdiction over the uniquely local substantive matters which this case presents, we would not only impair our ability to consider the vast array of cases

that properly belong in federal forums but, as surely as sunrise, we create yet another and an unnecessary interference with orderly State processes.

Only if a false vanity duped us into supposing that the quality of justice in the federal court system is somehow superior to that dispensed by the State, could we justify such an incursion into intrastate affairs. To the contrary, State courts are best equipped to determine the meaning and the scope of State statutes and local policies and to determine whether State officials encroached upon Dr. McDowell's rights of due process which are fully preserved in Texas courts by the Texas and the federal Constitution. Cf. Hill v. City of El Paso, Texas, 437 F.2d 352 (5th Cir. 1971). This is the basic premise for federal deference to State decisional processes in Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970) and Fornaris v. Ridge Tool Co., 400 U.S. 41, 91 S.Ct. 156, 27 L.Ed.2d 174 (1970).

More recently the Court expressed these fundamental concepts on which we here depend in these words: ' * * * 'comity' * * * (between the State and federal court system involves) a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.' Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669."

The Alabama Supreme Court in the *Certain supra* case further notes:

" . . . *The only State law claims, which included Certain's allegations that his rights under State law were violated, were dismissed and are not subjects of this appeal.*" (Emphasis supplied)

The City maintains that this is a correct statement of the law in this case. In pages 'd' - 'g' of his Brief, Mr. Certain states Alabama law that is irrelevant to this appeal.

The State law claims made by Certain are claims that were not tried in the Trial Court or considered in the appeal to the Supreme Court of Alabama. Mr. Certain should not have waited until this late date to raise issues of impropriety under State law. The Honorable United States Supreme Court should not consider these *new* issues on appeal. In the *Certain supra* case, the Alabama Supreme Court continues:

"Certain contends that the rules and regulations of the Huntsville Police Department are invalid under the United States Constitution and Federal laws. The regulations to be considered state:

"...

"1.3.9.18 *POLITICAL SOLICITATIONS* — Members or civilian employees of the department shall not solicit contributions in money or any other manner, directly or indirectly, on any pretext, to any person, committees, or associations for partisan political reasons, nor shall they interfere or use the influence of their office for partisan political reasons."

It should again be noted that Regulation No. 1.3.4.24 was not submitted to the Trial Court jury for consideration and is therefore not an issue in this appeal.

The Alabama Supreme Court continues in their decision in the *Certain* case:

"Certain argues that these regulations are vague and overbroad, infringe upon his First Amendment Rights, and violate the Equal Protection Clause of the United

States Constitution because they deprive him of a 'substantive right to participate in the electoral process equally with other voters.'"

"This type of regulation of public employees has been challenged numerous times in the Federal Courts. Probably the best known case is *United Public Workers of America v. Mitchell, supra.*, in which the United States Supreme Court upheld Section 9(a) of the Hatch Act (5 U.S.C. Sec. 7324), which made it 'unlawful for any person employed in the executive branch of the Federal Government . . . to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof.' The Supreme Court recognized that this section interfered with a citizen's rights under the First, Ninth, and Tenth Amendments 'to act as a party official or worker to further his own political views.' *United Public Workers of America v. Mitchell,* 330 U.S. at 94. Nevertheless, it upheld the statute because the legislation 'leaves untouched full participation by employees in political decisions at the ballot box and forbids only the partisan activity of federal personnel deemed offensive to efficiency.' 330 U.S. at 99.

> (Furthermore,) (i)t is only partisan political activity that is interdicted. It is active participation in political management and political campaigns. Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the government employee does not direct his activities toward party success.

330 U.S. at 100. Not only was the act not overly broad, but it was found to be a reasonable and necessary limita-

tion to protect the integrity and competency of the government services.

The concerns of the Supreme Court have been reiterated in detail by the Fifth Circuit in *Wachsman v. City of Dallas,* 704 F.2d 160 (5th Cir. 1983); reh. denied, 710 F.2d 837 (1983), appeal pending in U.S. Supreme Court. Dallas city firemen and a police and fire action committee challenged a Dallas ordinance which prohibited city employees from circulating petitions and giving, soliciting, or receiving contributions in connection with non-partisan city council elections. The ordinance also prohibited city employees from managing or soliciting contributions for any partisan political campaigns. These were the only provisions before the Fifth Circuit. The Court held that these were constitutional restrictions on city employees. It could find no basis for judging the validity of these provisions on the basis of whether they applied to partisan or non-partisan political activities. It found that 'societal' interests could be adversely affected by unrestrained partisan or non-partisan political activities by government employees. The Court identified four 'societal' interests:

> (T)he interest in an efficient government; that in a government which enjoys public confidence; that in the right of individual citizens to be free of governmental discrimination based on their political activities or connections; and that in the right of government employees to be free of employer pressure in their personal political decisions. The potential conditions which would be harmful or injurious to these important societal interests include the following three. First the condition could exist in which 'employment and advancement in Government service' is made to depend on political performance' rather than on 'official effort' or 'meritorious performance.' This not only impairs the efficiency of gov-

ernment directly, by depriving it of the services of the more capable for the positions so affected, but also indirectly, by its adverse effects on employee morale. This condition is also injurious to the governmental employees' right to be free of employer pressure to affiliate with a candidate they may personally abhor or 'to perform political chores in order to curry favor with their superiors rather than to act out their own beliefs.' Moreover, this condition obviously tends to undermine public confidence in government. A second harmful condition is that of governmental employees 'practicing political justice,' or exercising 'political influence . . . on others,' or channeling 'governmental favor' 'through political connections.' Such a condition is seriously injurious to the rights of individual citizens to be free of governmental discrimination based on their political activities or connections. It also impairs public confidence in government. Governmental efficiency is also adversely affected in that governmental administration is deflected from the direct and purposeful implementation of the laws and policy choices made by those charged with that responsibility generally the elected representatives, and is instead focused on furtherance of the political objectives of the civil servant. Third, the condition may occur under which 'the political influence of federal employees' is brought to bear without restraint 'on the electoral process,' or the governmental work is employed to to build a powerful 'political machine.' This condition undermines public confidence in government both because it tends to cast government in the light of master rather than servant of the people, and because it involves use of governmental power for purposes other than those for which the government was instituted. The latter factor also impairs governmental efficiency in the exercises of its proper purposes.

704 F.2d at 166-167."

"Regulation 1.3.4.24, which restricts the department's employees from engaging in partisan politics, and the latter provision of Regulation 1.3.9.18, which forbids the use of the influence of the office for political reasons, are *not* unconstitutional violations of Certain's First Amendment rights, or of his guarantees under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. The regulations are admittedly infringements upon his rights and subject him to treatment different from other citizens. *However, when tested by the standard set out in the federal cases, it cannot be denied that the purpose of the regulations is rationally related to the important governmental and societal interests discussed in the federal cases.* (Emphasis supplied) The City has not been unreasonable in its enforcement of these provisions. *There is evidence that officers who desire to assist a political campaign or candidate, or run for office themselves, have been granted a leave of absence in order to do so,* and then allowed to return to the department with no discipline or threat of discipline." (Emphasis supplied)

"With regard to the first provision in Regulation 1.3.9.18, which prohibits the solicitation of contributions for partisan political reasons, . . . this regulation is also constitutional."

"The constitutionality of this type of regulation was first decided in *Ex Parte Curtis,* 106 U.S. 371 (1882). Curtis argued that a federal statute which prohibited federal employees of the executive department 'from requesting, giving to, or receiving from any other officer or employee of the government, any money or property or other thing of value for political purposes,' was unconstitutional. The

Supreme Court found the statute to be necessary to avoid the possibility that employment would be hinged upon a contribution to the 'right' political candidate or party, rather than meritorious service. It reasoned that Congress had the power to regulate the political conduct of its employees so long as such regulation was necessary and reasonable. *'The right to contribute money through fellow employees to advance the contributor's political theories was held not to be protected by any constitutional provisions.' United Publi. Workers of America v. Mitchell,* 330 U.S. at 97, discussing *Ex Parte Curtis,* 106 U.S. 371." (Emphasis supplied)

"A provision more similar to the one before us, and broader than the one considered in *Curtis,* was upheld in *Broadrick v. Oklahoma,* 413 U.S. 601 (1973). That provision stated that '(n)o employee in the classified service (i.e., no classified state civil servant) . . . shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment or contribution for any political organization, candidacy or other political purpose.' The Supreme Court upheld the statute 'at least insofar as its forbids classified employees from: soliciting contributions for partisan candidates, political parties, or other partisan political purposes.' *Broadrick v. Oklahoma,* 413 U.S. at 616. It relied on another decision handed down the same day, *United States Civil Service Commission v. National Association of Letter Carriers,* AFL-CIO, 413 U.S. 548 (1973), which upheld Sec. 9(a) of the Hatch Act and defined what is meant in the Act by 'an active part in political management of in political campaigns.' For a definition, the Court in *Letter Carriers* referred to a list of 'Prohibited Activities', which appeared

in the Civil Service Regulations. Among the forbidden activities listed was: 'Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose.' The Supreme Court held that this provision was a *valid restriction* upon federal employees and was *not vague* or overly broad." (Emphasis supplied).

"The regulations are challenged only as being violative of the federal Constitution. Applying the test enunciated in (federal) cases, the regulations are not unconstitutional or overly broad. The Supreme Court in *Broadrick* addressed this last point. It noted that although the Oklahoma statute regulated a substantial spectrum, of conduct, the acts of which the appellants were accused were clearly prohibited by the statute; therefore, it could not say that under those circumstances the act was overly broad. "We do not believe that Sec. 818 (of the Oklahoma Act) must be discarded *in toto* because some persons' arguably protected conduct may or may not be caught or chilled by the statute." *Broadrick v. Oklahoma,* 413 U.S. at 618.

Certain testified that he wanted to 'participate in political activity', while he was on the police force, but did not do so because of the regulations. This conduct clearly may be regulated by the City. There is no evidence that he intended to do, or was disciplined under the regulation for doing, something which is constitutionally protected, and which could not be regulated by the City. Furthermore, Certain was not a member of the department at the time of his suit, and under *Broadrick,* Certain has no standing to raise someone else's rights . . . "

"The City moved for directed verdict on each individual claim within the Sec. 1983 claim, including the

claim that the above regulations were an unconstitutional infringement upon Certain's rights. This Motion was denied and all claims were submitted to th jury which was instructed to return a general verdict on the Sec. 1983 claim if it found for the plaintiff. This it did . . . *(T)he Court erred in denying the City's Motion For Directed Verdict on the plaintiff's claim that the Huntsville Police Department's regulations violated the Federal Constitution."* (Emphasis supplied)

The Police regulations are not unconstitutional infringements upon Certain's rights. The Alabama Supreme Court was correct in holding that the lower Court should have granted the City's Motion To Dismiss For Failure To State A Claim Upon Which Relief Could Be Granted. The Alabama Supreme Court decision, supra, continues:

"Under Alabama law, if two claims for relief are submitted to a jury, one supported and one unsupported, by the evidence and the law, and the defective claim has been specifically challenged by a Motion For Directed Verdict, a general verdict cannot stand. *Ex Parte Nix,* 401 So. 2d 64 (Ala. 1981)."

"This rule of law is applicable to this case. It was error to deny the City's specific Motion For Directed Verdict on the claim challenging the regulations under the federal Constitution and to submit that claim to the jury. The jury may have found that the above regulations infringed upon Certain's federal rights and based its verdict on this determination. If so, the verdict is incorrect, and the Judgment entered on it must be reversed. Of course, the jury may have found that one or more of the other allegations in support of the Sec. 1983 claim were

true and rendered its verdict on that basis. Because the jury returned a general verdict on the Sec. 1983 claim, as instructed by the Court, it is impossible to know whether the verdict rests upon a proper or improper basis. Because of the possibility that the jury founded its verdict upon the claim having no basis in the law . . . " the Alabama Supreme Court was correct in reversing the Trial Court.

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CONCLUSION

The Supreme Court of the State of Alabama correctly ruled on the constitutionality of a Huntsville Police Regulation that concerned the political activities of Huntsville Police Officers. The Huntsville Regulations are very similar to the Hatch Act which proscribes political activity for government employees. The Hatch Act has been tested many times and the U.S. Supreme Court has always found the Act to be constitutional. The Writ of Certiorari should be denied because the Huntsville Regulations are also constitutional.

Respectfully submitted,

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